(32825—9-66) 14

STATE OF ILLINOIS

APPELLATE COURT

47 I.A.2 27

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE FRANKLIN R. DOVE, Presiding Judge

HONORABLE C. ROSS REYNOLDS, Judge

HONORABLE CLARENCE E. WRIGHT, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 2nd day of APRIL A. D. 19 64, there was filed in the office of the said Clerk of said Court an opinion of said Court, in words and figures following:

General No. 10512 (47 I.A.2d 27) Agenda No. 3.

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT.

David Cummings, Plaintiff - Appellant, vs. Joseph Ragan, Director of Public Safety of the State of Illinois, Defendant - Appellee.	Appeal from the Circuit Court of Sangamon County.

REINOLDS, J.

This is an appeal from an order of the Circuit Court of Sangamon County, dismissing plaintiff's complaint for injunction. Plaintiff filed his suit as a taxpayer against Joseph Ragen, Director of Public Safety of the State of Illinois, praying that

Joseph Ragen be enjoined from receiving the benefits of a home at Stateville Penitentiary, Joliet, Illinois, and other benefits at said place; from receiving monies by virtue of travel vouchers from the State of Illinois, and for such other relief as the court might deem equitable and proper. The complaint was filed July 12, 1963 and summons was issued on the same day. Service was had on Ragen by leaving a true copy of the summons with the Secretary of the Director on June 18, 1963. Thereafter on June 26th, 1963, the defendant Ragen, by William G. Clark, Attorney General of the State of Illinois, and Joseph A. Londrigan, Special Assistant Attorney General, moved to dismiss the complaint for the following reasons:

1. The action was not commenced by petition for leave to file in equity as required by statute.

2. No notice in writing was given the defendant or the Attorney General by the plaintiff specifying the fact that petition for leave had been presented to the Court and the day when the same would be heard.

3. The complaint was filed without an order of Court granting plaintiff leave to do so.

4. The Court was without jurisdiction over the subject matter

of the complaint since the same was filed in violation of statutory requirements.

On June 28, 1963, the parties being present in Court, either in person or by attorney, the plaintiff orally objected to the Attorney General representing the defendant. The Court overruled the objection. The plaintiff by his attorney then entered an oral motion for leave to amend the complaint within 30 days. The court denied this motion. Thereupon the court called up the motion of the defendant to dismiss the cause of action, and having heard the argument of counsel, held that the motion to dismiss should be allowed and dismissed the cause for want of jurisdiction. Plaintiff appealed to this Court.

Paragraph 11, Chap. 102, Ill. Rev. Stat. 1961, provides for a suit in equity to restrain and enjoin the disbursement of public funds by any officer or officers of the State government may be maintained by the Attorney General or by any citizen and tax payer of the state. Section 14 of the same Chapter of the Statutes provides that such a suit, if prosecuted by an ordinary citizen and tax payer instead of the Attorney General, must be commenced by a petition for leave to file it, and if the court is satisfied that there is

reasonable ground for filing the suit the petition may be granted.

Chapter 14, Section 4, Ill. Rev. Stats. (1961) provides:-

"The duties of the Attorney General shall be:-

...

Third: To defend all actions and proceedings against any state officer, in his official capacity, in any of the courts of this State or the United States."

The plaintiff does not contend that he has complied with the provisions of the Statute. Rather, his position seems to be that the remedy asked for in his complaint is not to enjoin the disbursement of public funds by any officer or officers of the State government, but is to enjoin Joseph Ragen from cashing travel and home expense vouchers given to him by the State of Illinois. He contends that the acts of Ragen in accepting the vouchers are outside the scope of Ragen's authority as Director of Public Safety, and therefore not governed by Chapter 102, Section 14, as aforesaid. The final paragraph of the argument of plaintiff admits that if this suit had to be brought against the disbursing officer and not Joseph Ragen, additional equitable relief could not be granted.

It is difficult to follow the plaintiff's reasoning. If he predicates his suit as a tax payer, the only method is that prescribed by the Statute. As an individual and not as a tax payer, plaintiff has no right of suit against Ragen. The right is given by Statute to a citizen of the State who proceeds as a tax payer, not as an individual. The basis of his suit is that public moneys are being illegally spent. His remedy is as a tax payer against a public official. He cannot evade the requirements of the enabling Statute by argument that he seeks remedy against the defendant as an individual. The title of the cause, and the complaint itself, names Joseph Ragen, not as an individual, but as Joseph Ragen, Director of Public Safety of the State of Illinois. In the beginning of the complaint, the plaintiff complains "of the Defendant, JOSEPH RAGEN, as Director of Public Safety,.." To claim that Joseph Ragen, as Director of Public Safety, is not disbursing public moneys illegally, but is receiving them illegally, and that such a complaint by a citizen as a tax payer is not within the provisions of the Statute governing suits by tax payers seeking to prevent and enjoin the disbursement of public moneys, is only a transparent attempt to circumvent the requirements of the Statute. Because

of the failure of the plaintiff to proceed in accordance with the provisions of Chap. 102, Sec. 14, of the Statutes, the dismissal of the complaint by the trial court was proper. The language of the pertinent section of the Statute is plain and unambiguous. It provides certain steps that must be followed.

In the case of Strat-O-Seal Mfg. Co. v. Scott, 27 Ill. 2d 563, the court said:

..."As we have indicated, the statute governing these proceedings provides that when suit to restrain the disbursement of public moneys is brought by a citizen taxpayer, it must be commenced by petition for leave to file. The purpose of this requirement was to establish a procedure which would serve as a check upon the indiscriminate filing of such suits. (Bareo Manufacturing Co. v. Wright, 10 Ill. 2d 157.)" ...

The plaintiff has misinterpreted his method of procedure. He is required to file a petition for leave to file his complaint and attach to such petition for leave to file, a copy of the complaint. If such procedure is followed, the trial court can only pass on the sufficiency of his complaint. The trial court is not concerned with

whether the allegations in the proposed complaint can, on hearing be sustained, but whether the petition states reasonable grounds for filing suit. The requirements must be complied with and cannot be by-passed, circumvented or evaded. Unless fully complied with, the court has no jurisdiction.

The Attorney General is required by law to defend all actions and proceedings against any state officer, in his official capacity, in any court of the State or the United States. Joseph Ragen was sued as Director of Public Safety of the State of Illinois. As such Director, he was a state officer within the meaning of the pertinent Statute. The appearance of the Attorney General for the Director of Public Safety was proper and in compliance and discharge of his duties as Attorney General.

The order dismissing the case for want of jurisdiction is affirmed.

Affirmed.

DOVE, P.J. and WRIGHT, J. concur.

(47 I.A.2 30)

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Third District)

At a session of the Appellate Court, begun and held at Ottawa, on the 1st day of January, in the year of our Lord one thousand nine hundred and sixty-four, within and for the Third District of Illinois:

Present -- Honorable JOHN T. CULBERTSON, JR., Presiding Justice
Honorable A. J. SCHEINEMAN, Justice
Honorable BURTON A. ROETH, Justice
JULIUS R. RICHARDSON, Clerk Pro Tempore
JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards, on MAR 26 1964 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

Abstract

No. 64-8 Publish Abstract Only February

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

47 I.A.2 30

CHARLES H. DOBBINS and MILWAUKEE INSURANCE COMPANY of Milwaukee, Wisconsin,

Plaintiffs-Appellants,

vs.

WILLIAM EAECHLER, State Farm Mutual Automobile Insurance Company, and ALBERT TOMBLIN,

Defendants,

(State Farm Mutual Automobile Insurance Company)

Appellee.

Appeal from the Circuit Court of Tazewell County

Honorable Henry J. Ingram, Judge Presiding

Scheineman, J.

The plaintiffs, Charles H. Dobbins and Milwaukee Insurance Co., filed suit for a declaratory judgment directed principally at the defendant-appellee, State Farm Mutual Automobile Insurance Co. It is the aftermath of prior litigation consisting of a suit for damages for personal injuries.

The prior suit was brought by Albert Tomblin, who was a passenger for hire in an automobile operated by Dobbins. Dobbins brought his car to a sudden stop, and William Baechler, operating a following vehicle, collided with the rear end of the Dobbins' car causing injuries to Tomblin.

at 174, 175 N. E. 2d 429; Gulf, Mobile and Ohio R. R. Co. v. Arthur Dixon Transfer Co., 343 Ill. App. 148 at 152, 98 N. E. 2d 783.

There are certain apparent exceptions to this principle of law. Thus where a defendant is held liable by reason of his status or other connection with an injury, but had not actually committed any active negligence, he may enforce contribution against another who was the one actually responsible for injuries. The courts commonly refer to the two parties as joint tort-feasors. For this reason, it appears that the suit by the passive person is an exception to the rule barring contribution suits among joint tort-feasors. Actually the situation is different from the ordinary case of joint torts and probably should be given a different name, since the plaintiff must be innocent of any active negligence.

The plaintiffs herein cite a number of cases of the type just mentioned in an effort to bolster their claims. However, the Appellate Court, on the Dobbins' appeal above mentioned, expressly referred to evidence that Dobbins had stopped his automobile suddenly without signal or regard to a known following automobile, and held this justified a jury verdict against Dobbins.

This is clearly a finding that Dobbins was actively negligent and that he violated his duty of due care to his paying passenger. Therefore, he is an actual tort-feasor and does not meet the requirements of a passive actor, who is permitted to recover from one who was the only actively negligent person. This type of situation is fully discussed in Gulf, Mobile and Ohio R. R. Co. v. Arthur Dixon Transfer Co., 343 Ill. App. 148, 98 N. E. 2d 783. Since Dobbins has no right to sue the other tort-feasor and his insurer, there is nothing to which Milwaukee Insurance Company can claim subrogation.

Tomblin filed his suit against Dobbins and Baechler and obtained a verdict against the defendants jointly in the sum of $45,000.00. From the judgment entered on that verdict Dobbins appealed and Baechler did not appeal. The judgment was affirmed. Albert Tomblin v. Charles Dobbins, et al., 32 Ill. App. 2d 293.

Thereafter the plaintiff herein, Milwaukee Insur. Co., as insurer of Dobbins, paid its policy limits of $30,000.00 plus interest. Thereafter this suit for declaratory judgment was filed, which seeks to require State Farm Mutual as insurer of Baechler to contribute something toward the loss paid by Milwaukee. Thus it becomes apparent that this suit was brought by one of two joint tort-feasors and his insurance carrier against the other joint tort-feasor and his insurance carrier in an effort to recoup some part of the payment made to the injured person Tomblin.

In support of this type of suit, it is argued for the plaintiffs that principles of fireside justice and equity should be applied to require the other joint tort-feasor or his insurance carrier to contribute toward the payment of Tomblin's judgment, made by Dobbins' insurer.

Somewhat persuasive arguments may be advanced to the effect that, when the acts of several individuals contribute to causing injury to a third party, the liability should not fall on any one, but all the tort-feasors should be required to contribute on some basis toward the payment of damages. The only thing wrong about this type of argument is: It is contrary to the law in Illinois. The principle that there can be no contribution enforced among joint tort-feasors has been so frequently and consistently announced by the courts of review in this state, that the statement of the principle no longer calls for any discussion or even citation of precedent. e.g. Shulman v. Chrysler Corp. 31 Ill. App. 2d 168

The trial court granted defendants' motion to dismiss the declaratory judgment suit, and when plaintiffs elected to stand on their complaint, a final judgment in bar was entered. The action of the trial court was correct, and the judgment is affirmed.

JUDGMENT AFFIRMED

Culbertson, P. J., and Roeth, J., concur.

STATE OF ILLINOIS,
APPELLATE COURT, } ss.
THIRD DISTRICT,

I, J. LINDO SILVER, Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa,

this 10th day of July
in the year of our Lord one thousand nine hundred

and sixty-seven.

J. Lindo Silver
Clerk of the Appellate Court.

(32825—9-66) 14

STATE OF ILLINOIS

APPELLATE COURT

(47 I.A.2d 133)

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE DEWITT S. CROW, Presiding Judge

HONORABLE JOHN F. SPIVEY, Judge

HONORABLE SAMUEL O. SMITH, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 9th day of APRIL A. D. 1964, there was filed in the office of the said Clerk of said Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 10516 (Abstract Only) Agenda No. 3, 1964

Gary Alan Patterson,
Plaintiff-Appellee,
vs.
Elizabeth Patterson,
Defendant-Appellant.

Appeal from the
Circuit Court
of Macon County

SPIVEY, J.

Gary Alan Patterson, hereafter called plaintiff, brought an action for divorce against Elizabeth Patterson, hereafter called defendant. This appeal is taken by defendant from a decree of the Circuit Court of Macon County granting a divorce to plaintiff on the grounds of adultery, awarding plaintiff custody of the minor child of the parties, dissolving the temporary injunction previously issued against plaintiff, and dismissing defendant's counterclaim for separate maintenance. The cause was tried before the court without a jury.

The parties were married in Decatur, Illinois, on January 19, 1962, and thereafter cohabited until March 5, 1963, on which date defendant left the marital home. One child, a daughter named Laura Elizabeth, was born of the marriage.

Plaintiff's complaint for divorce alleged that defendant committed adultery on or about June 13, 14, 15, and 16, 1963, with

one certain male person known as "X" and with other unknown persons at other times and places unknown.

The complaint further alleged that defendant was unfit to have the care, custody and control of the child due to her improper conduct, in that she neglects the child, frequents taverns and uses intoxicants excessively. Plaintiff prayed that the parties be divorced and that he be awarded the care, custody and control of the child and for such other relief as equity may require.

In her answer defendant denied the allegations of adultery and unfitness to have custody of the child. In addition, she filed a counterclaim for separate maintenance, charging plaintiff with desertion without fault on her part and alleging that plaintiff was unfit to have the care, custody and control of the child due to his unstable, erratic behavior and violent temper and due also to a lack of suitable facilities for child care. Plaintiff answered the counter-claim denying the essential allegations related herein.

In support of his allegations of adultery plaintiff testified that on Thursday, June 13, he drove to the vicinity of defendant's apartment at about 10:45 P.M. and sat on a stone pillar in front of the house next door to his wife's apartment and waited. Approximately an hour later he saw a man leave defendant's apartment by the door leading from the kitchen. He followed the man and saw him get into a blue Chevrolet bearing license number CT 2510 and drive away. During the time he waited, the lights in the apartment were on and he saw no one else enter or leave the apartment.

Plaintiff testified that on June 14 he returned to the vicinity of defendant's apartment, this time with two fraternity

brothers, Dennis Bunting and James Talbert, and waited at the same pillar at the house next door. They arrived between 10:30 and 11:00 P.M. and stayed until sometime between 1:30 and 2:00 A.M. They observed the blue Chevrolet in the same position it had been on the previous night. After a time the lights in the apartment went off. They saw no one enter or leave the apartment or the apartment building.

Plaintiff further testified that on June 15 he returned to the vicinity of his wife's apartment with his fraternity brother, Mike Waller, and was later joined by his friend or acquaintance, Gene Bellcheck. On that night plaintiff drove by defendant's apartment several times but at 10 minutes before 1:00 A.M. he stayed with his friends and watched the apartment from the stone pillar next door until 6:00 A.M. They saw the blue Chevrolet but again they saw no one enter or leave the apartment.

As to June 16, plaintiff testified he went to the vicinity of the apartment of defendant with Mike Odachi and his mother, Maxine Patterson. They arrived at about 20 minutes till 9:00 P.M. The blue Chevrolet was not there. Plaintiff's mother waited at the stone pillar while Mike and the plaintiff waited in Mike's car until about 9:05 when the blue Chevrolet pulled up and parked. Plaintiff testified that he and Mike followed the man who got out of the Chevrolet, saw him go up to the door leading to defendant's kitchen and saw defendant, dressed in a negligee, open the door and admit the man. He then saw his wife lift up a drape next to the door and look out, then let the drape fall. At 10:45 the lights in the apartment went out. They stayed until 2:15 or 2:30 A.M. and the man did not come out of the apartment and the Chevrolet remained where it had been parked.

On cross-examination plaintiff testified that the male person called "X" in the complaint was William Faris.

Plaintiff cross-examined the defendant under Section 60 of the Civil Practice Act. She testified during that examination that she did not specifically remember the particular dates but that on Thursday or Friday, June 13 or 14, she had dinner with her supervisor, Charlene Lennen. They left for dinner at a restaurant at about 6:30 P.M. and returned to defendant's apartment at about 11:00. At 11:15 or 11:30 Bill Faris arrived at defendant's invitation to meet Mrs. Lennen. After an hour, at about 12:15 or 12:30, Mr. Faris and Mrs. Lennen left. Mr. Faris walked Mrs. Lennen to her car, returned to get his briefcase and jacket and left immediately. She further testified on Thursday or Friday of that week, whichever night she did not go to dinner, she probably saw Mr. Faris because she borrowed his car. She also testified that on that night Mary Ann McKinley was there.

Defendant did not remember the evening of June 15 but testified that if Mr. Faris was there, someone else was also there. She was not asked specifically about June 16 but in response to questions by plaintiff's counsel testified that Mr. Faris did not stay in her apartment any of the nights of June 13, 14, 15 or 16, and neither did anyone else; that no man entered her apartment after Mr. Faris left; and in response to specific questions put by plaintiff's counsel, stated that since she had been married to plaintiff she did not have sexual relations with any man other than her husband and she did not have sexual relations with Bill Faris.

She further testified that Mr. Faris came to get his car, which she had borrowed on Thursday or Friday, June 13 or 14, on the following Sunday afternoon.

Defendant in her statement of facts admits that after the separation she began seeing Bill Faris, a married man with three children. They frequently had lunch together, dinner together, went for rides and he visited her at her apartment several times a week. It was also admitted that at the time of the trial, Faris was living in an apartment in the same apartment house occupied by the defendant.

Plaintiff called as his witness Bill Faris who testified that he had never had sexual relations with the defendant. Faris said he did not remember if he was in the defendant's apartment on June 13, and that he believed he was there on Friday, June 14 and left at approximately midnight. He further testified that on Saturday, June 15, he was in defendant's apartment from about 8:00 P.M. until 11:30 or 12:00 midnight and then went to James Manner's Tavern and that he slept at James Manner's house that night.

On cross-examination Mr. Faris testified that he loaned his automobile to defendant on numerous occasions and that he had loaned it to her on June 13, 14, 15, and 16.

On redirect examination Mr. Faris testified that on each occasion he has been in defendant's apartment someone else was also there with him and defendant. Faris did not testify specifically regarding the occasion of June 16.

Plaintiff also called as his witnesses Dennis Bunting, Mike Waller, Mike Odachi and Maxine Patterson, all of whom corroborated his testimony with regard to observation of defendant's apartment.

Both the defendant and Faris said they had never had sexual relations. The defendant further testified that she used Faris' car all the time; that she didn't know how Faris left on any occasion when she did so. The wife of William Faris testified that the only Saturday night he slept at home during June, 1963, was the last week end of that month.

Defendant testified that during January and February of 1963 after work she seldom went home when the child was not there but went various places, occasionally taverns or the homes of friends.

Plaintiff's mother and father testified to the defendant's appearance at the senior Patterson's home intoxicated on three occasions and on other occasions when she had been drinking. Plaintiff offered other evidence that defendant had been seen in Don's Tavern, Merle's Party Liquors, a tavern, and Greider's Wooden Shoe, a restaurant and tavern.

Defendant's mother testified that the defendant had received psychiatric care from the time the defendant was two and one half years old.

For the defendant, her psychologist testified that the defendant had a personality trait disturbance, but that in his opinion she would be a fit and proper mother. He also testified that the plaintiff was not likely to be as fit a parent as the defendant. The psychologist stated his opinion might or might not be affected by proof that the defendant had committed adultery in June of 1963.

Marie Lowe, the defendant's landlady, testified as to the events of June 13, 14, and 16. She contended that she was with the defendant on the 16th of June and that she and her boyfriend and the defendant and Bill Faris played cards until 10:00 P.M. when Mr. Faris left from the landlady's apartment. She also testified to being with the defendant on June 13 and 14 and related that Bill Faris was not present those nights. Miss Lowe also testified that the defendant had provided her child with proper care.

One of the defendant's fellow employees testified that the defendant was a good worker and that she (the fellow employee) had not seen the defendant intoxicated.

Defendant's supervisor testified that she was with the defendant on June 12th, 13th, 14th or 15th for dinner and then visited at defendant's home afterwards. She said that Bill Faris came to the apartment later and they had some drinks but that Faris left when she did at midnight. She stated that she observed the defendant give very good care to the child, and stated that she had never seen the defendant intoxicated. A field representative for the Illinois Public Aid Commission also testified that the defendant had never been intoxicated in her presence.

Another neighbor testified that she was in the defendant's apartment daily from June 13 to June 16 but she admitted that she was not certain as to any times or dates.

In announcing his decision, the court said, "With reference to the issues in this case, and particularly the comments of two witnesses -- I don't believe Mr. Faris at all. It is true that he

was actually the witness of the plaintiff. However, I cannot believe a word he said. I also don't believe the defendant in this case with respect to her denials of adultery. That leaves the evidence of the other witnesses, and I do believe them. I believe it is substantiated by the testimony of the defendant that she has been seeing the man Faris, the witness Faris, constantly."

It is defendant's theory that: (1) the findings of the trial court on the issue of adultery are contradicted by direct evidence offered by plaintiff and are contrary to the manifest weight of the evidence; and (2) the finding of unfitness on the part of the defendant and the awarding of custody of a child of tender years to the father is contrary to the evidence and the law.

Defendant contends that since the plaintiff called William Faris as his witness and Faris denied sexual relations with the defendant, the plaintiff is bound by the testimony of Faris. This position is not tenable.

In Wisniewski v. Shimashus, 22 Ill. 2nd 451, 462, 176 N.E. 2d 781, one of the plaintiff's witnesses testified to a certain conversation and then another witness for the plaintiff disputed the claimed conversation. It was suggested that the court erred in allowing the plaintiff to impeach her own witness. The Supreme Court stated, "A party is not conclusively bound by the statements of a witness whom he has called to give testimony. He may call another witness to disprove such statements. The general rule that a party may not impeach a witness he has voluntarily introduced is not infringed by the introduction of other testimony disproving the statements of such witness as to the facts and circumstances involved in the hearing."

To the same effect is the case of Highley v. American Exchange National Bank, 185 Ill. 565, 57 N.E. 436.

It is defendant's contention also that her testimony and the testimony of Faris stand unimpeached and uncontradicted and the court was obliged to accept the assertions that the sexual act was not committed. "The testimony of a witness may itself contain its own impeachment and, if so, neither court nor jury is required to give it credence, and it may be disregarded." Schueler v. Blom strand, 394 Ill. 600, 69 N.E. 2d 328.

We need not speculate as to the weight given this testimony. The trial court announced that he did not believe the testimony and we cannot disagree.

This court is composed of trial judges who have spent many years on the trial bench. It has been our lot to weigh the testimony of men and women and observe and become acquainted with their acts and doings. We have come to know that while an oath may be willingly taken, that oath may just as willingly be broken and disregarded. Courts must not be obliged to know less than men. We allow the untrained juror to spot the liar and the cheat, and accept their judgment on issues of fact. Yet defendant would have us say that the trial judge who patiently heard testimony filling 450 pages may not disbelieve that which is not reasonable. The court may measure people by the things they do as well as the things they say. We would not expect the sexual act to be committed openly so that there would be witnesses to every detail. At the same time we must assume that the defendant is cognizant of the inference that would be created by her flagrant, brazen course of conduct.

The contention is made that the finding of the court on the issue of adultery is contrary to the manifest weight of the evidence. From our summary of the evidence, we are convinced that the court's finding was amply supported by the evidence. The court's findings of fact are entitled to great weight and in this case, where they are supported by sufficient evidence they will not be disturbed. The defendant has played the game and so must accept the name.

Finally, defendant contends that the court's finding of unfitness on the part of the defendant and the award of custody to the plaintiff is contrary to the evidence and the law.

Defendant properly contends that the Illinois courts have favored the award of custody of a child of tender years to the child's mother if the mother is a fit and proper person. Thus we need only consider the question of fitness of the defendant. Reliance is placed upon the cases of Nye v. Nye, 411 Ill. 408, 105 N.E. 2d 300, and Arden v. Arden, 25 Ill. App. 2d 181, 166 N.E. 2d 111.

In the Nye case, the mother and a man not her husband were found engaged in improper conduct by her former husband. That same day, Mrs. Nye married her paramour. The trial court found the mother to be unfit and awarded custody of the child to the father. The Appellate Court reversed and the Supreme Court affirmed the judgment of the Appellate Court. In its opinion, the court said,"The prior misconduct gave no evidence of adverse effect on the future welfare of the child. Where the mother is able to care for her minor daughter and is not shown to lack the proper attributes of good motherhood, past misconduct, where the evidence indicates no

probable future misconduct, should not be a basis for denying custody to the mother."

The facts in this case are different, however, from the facts in the Nye case. There, there was proof of one indiscretion and the parties to the indiscretion immediately married. In this case there has not been and perhaps cannot be any amelioration of the circumstances. Rather, the circumstances have worsened. Faris has moved into the same building with the defendant. Moreover, he cannot marry the defendant for he has a wife and three children waiting at home for him. There is no apparent solution to the problem created by the defendant and Faris and such a situation would create a poor environment for the child.

In the Arden case, there was a finding of adultery on one occasion and the court held that this was not such a situation as would justify the court in taking the custody of the child from the mother. The mother had previously been found to be a fit and proper person to have the custody of the child. In the instant case the court was not changing an order of custody, but rather was concerned in determining that which would be for the best interest of the child. The award of custody was not made upon a single instance of sexual promiscuity but rather upon evidence of a course of adulterous conduct with a married man, evidence of a rejection of standards of conduct and evidence of drinking and intoxication. The defendant was employed and when not working, spent a great deal of time in the company of Mr. Faris. It must be conceded that much of the time while she was with Mr. Faris, she was also with the child. Such a relationship cannot be in the child's best interest but rather, will inevitably

leave its mark upon this impressionable child. For all these reasons we feel that the court was justified in awarding the custody of the child to the plaintiff.

A case factually similar to this case is Wolfrum v. Wolfrum, 5 Ill. App. 2d 471, 126 N.E. 2d 34. In that case the trial court granted the husband a divorce on the grounds of adultery and awarded the father custody of two small children. The wife appealed and made the same contentions as the defendant does here. The court said "The facts in the case at bar are quite different from those in the Nye case, supra. There is evidence in the record which, if believed, discloses a shocking course of adulterous conduct by Marion Wolfrum with a man who himself is married and the father of a family. Assuming that her prior conduct could be condoned, there is no assurance that Mrs. Wolfrum's conduct in the future will improve. While she may be in a position to marry after the divorce in this case, it cannot be assumed the man with whom she is involved can ever attain the same freedom or for that matter even desires to do so. The Nye case, upon which Mrs. Wolfrum relies so heavily, states the rule succinctly at page 415 as follows: '. . . past misconduct, where the evidence indicates no probable future misconduct, should not be a basis for denying custody to the mother.'"

This court is unable, as was the court in the Wolfrum case, to find any hope of immediate reformation of the defendant. As was said in the Wolfrum case, "The trial judge heard the witnesses and is far better able than this court to assess their credibility and to predict which parent will best care for the children in the future."

For these reasons, the decree of the Circuit Court of Macon County is affirmed.

Affirmed.

CROW, P.J. and SMITH, J. concur.

STATE OF ILLINOIS

FOURTH DISTRICT

APPELLATE COURT—THIRD DISTRICT

AT AN APPELLATE COURT, Begun and held for the ~~Third~~ Fourth District of the State of Illinois, at Springfield, on the FIRST TUESDAY in MARCH A. D. 19 64

PRESENT

HONORABLE DeWITT S. CROW, Presiding Justice

HONORABLE JOHN F. SPIVEY, Justice

HONORABLE SAMUEL O. SMITH, Justice

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that afterward, to-wit: On the 31st day of MARCH, A. D. 19 64, there was filed in the office of the said Clerk of said Court, an opinion of said Court, in words and figures following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 10534 (Abstract Only) (47 I.A.2 133)

The People of the State of Illinois, Defendant in Error, vs. John L. Redpath, Plaintiff in Error.	)	Error to Circuit Court of Sangamon County

SPIVEY, J.

The defendant, John L. Redpath, entered a plea of guilty in the Circuit Court of Sangamon County to an information charging him with theft in an amount exceeding $150. He was sentenced to the penitentiary for a term of not less than three years nor more than five years.

He appeals to this court contending that the Court had not properly admonished him of the consequences of his plea of guilty and that he was represented by incompetent court appointed counsel in that said counsel allowed him to plead guilty without the Court first admonishing him of the consequences of such plea.

On December 14, 1962, the defendant in open court was furnished a copy of an information charging him with theft. At that time he was advised as to his right of counsel, which he declined.

The court advised him of the nature of the charges and of his rights. He consented that the proceedings might be by information rather than by indictment. In furtherance of this waiver of Grand Jury proceeding he executed a written document to that effect.

The Court then advised him that he might enter a plea of guilty or not guilty at this time. He was further advised that if he entered a plea of not guilty that he was entitled to a trial by jury or that he could waive that right and have a trial before the Court without a jury and in either event if he was found not guilty he would be released, but if found guilty he would be subject to a penalty of imprisonment for not less than one nor more than ten years in the Illinois State Penitentiary.

The defendant then advised the Court that he would like to enter a plea to the charges except for the word "permanently" on the last line in the information. He stated that he did take a car and that he knowingly obtained unauthorized control of the car and he pleaded guilty to that.

The Court in an abundance of caution told the defendant he felt that counsel should be appointed to advise the defendant in this matter and that the Court would enter a plea of not guilty on behalf of the defendant at this time with leave to withdraw the plea of not guilty and substitute any other plea.

The defendant then advised the Court that he knew he took the car wrongfully and by not returning it he suggested it amounted to theft. He stated that he had been arrested before and that he had done things like this before but that he knew when he

took the car and drove it to Oklahoma City that the man would get his car back because he had left his name and address with the lessor and that the people at the garage where he left the car would get it back.

At this point the Public Defender, without objection, was appointed to represent the defendant.

On January 15, 1963, after having been granted leave, defendant withdrew his plea of not guilty and filed his motion to quash, which motion to quash was by the Court overruled on January 23, 1963, whereupon defendant again entered a plea of not guilty.

On February 6, 1963, the defendant again appeared in open Court with his Court appointed counsel, the Public Defender, and asked leave to withdraw his plea of not guilty and enter a plea of guilty.

He was then interrogated by the Court as to whether or not any threats or promises had been made to him to change his plea from not guilty to guilty, to which the defendant answered no. He was further asked if he was entering the plea of his own free will after consulting with his attorney, to which he answered yes. Redpath further stated that he had never been in a mental institution and that his age was 31 years.

The Court thereupon accepted his plea of guilty and asked whether there was any reason why defendant should not be sentenced at this time. The Court was informed there was no evidence the defendant might submit in the way of mitigation and after a statement by the State's Attorney, which was not contradicted by the defendant, the Court imposed the aforesaid sentence.

In our opinion the admonitions of the Court given the defendant on December 14, 1962, and February 6, 1963, sufficiently complied with the objects contemplated by Division XIII, Section 4 of the Criminal Code, (Ill. Rev. Stats. Chapter 38, Section 732). (People v. Kontopoulos, 26 Ill. 2d 388, 186 N.E. 2d 312; People v. Harper, 28 Ill. 2d 28, 190 N.E. 2d 811.)

Defendant's contention that he was represented by incompetent counsel is without merit. His assertion of incompetence was predicated upon the premise that his counsel had permitted him to plead guilty without having been duly admonished of the consequences of entering such a plea. The defendant was in fact admonished of such consequences and cannot in that regard claim any prejudice.

It has been said that unless the alleged incompetence of counsel results in prejudice to the defendant such incompetence cannot be urged for reversal on appeal. (People v. Cox, 22 Ill. 2d 534, 177 N.E. 2d 211; People v. Morris, 3 Ill. 2d 437, 121 N.E. 2d 810.)

For the foregoing reasons the judgment of the Circuit Court of Sangamon County is affirmed.

Affirmed.

Crow, P. J., and Smith, J., concur.

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

47 I.A.2 134

Gen. No. 64 F 20 Agenda F-1

JULIUS KRUEGER, Plaintiff-Counter-Defendant, Appellant, vs. MARIE KRUEGER, Defendant-Counter-Plaintiff, Appellee.	Appeal from the Circuit Court of Effingham County.

CROW, P. J.

This is an appeal by Julius Krueger, the plaintiff, counter-defendant, from a decree dismissing for want of equity a complaint for divorce against Marie Krueger, defendant, counter-plaintiff, charging desertion, and finding the plaintiff guilty of desertion, that the defendant was living separate and apart from the plaintiff without her fault, that the plaintiff was not guilty of adultery, and awarding the defendant separate maintenance on her counterclaim, and support money of $62.50 per month. The plaintiff, Julius Krueger, on November 1, 1961, had sued the defendant, Marie Krueger, for divorce, alleging desertion, and the defendant had counterclaimed for separate

maintenance, alleging desertion and adultery. The case was tried by the Court without a jury.

No argument is presented here on the issue as to alleged adultery and that allegation is not before us.

The plaintiff's theory is that the Court erred in awarding the defendant separate maintenance, in awarding her the sum of $62.50 per month for support, and in denying the plaintiff's prayer for a divorce on the grounds of desertion.

The defendant's theory is that the evidence is ample to support her position that she is not guilty of desertion, the plaintiff is guilty of desertion, the defendant was living separate and apart without her fault, and is entitled to a decree for separate maintenance on her counterclaim, and that $62.50 per month is reasonable and proper considering the plaintiff's income and the earnings of the defendant from her employment.

The evidence is substantially as follows, as far as now material: The plaintiff and the defendant were married September 3, 1941 and separated May 15, 1955. There were no children and there are no property rights involved. At the time of the trial the plaintiff, Julius Krueger, was employed at an Altamont implement company, with a gross pay of $65.00 per week, and his take-home wages were $55.00 per week. His wife, Marie Krueger, was employed at a cafe at $10.00 per week. On or about May 15, 1955, the parties were living on

a rented farm, which the plaintiff was operating, called the "Kuffel Farm". On that day the plaintiff took his wife by car to her mother's residence, on the occasion of a birthday party for the mother at that residence, and at that time the plaintiff promised his wife that he would pick her up about midnight at the mother's residence, the plaintiff not staying for the party. He returned home and went to bed. He did not come for her, and her uncle and aunt brought her back to her own home that night and found the house locked. The defendant gained admission through a window and found the plaintiff in bed. The defendant then got ready for and proceeded to bed. The plaintiff then insisted that she could not stay there and told her to go back that night to her mother's place, and he immediately, within about an hour, proceeded to take her back there that night. He then told her to stay there until he came and got her, after he had planted the corn and beans. He had earlier told her to get her clothes. The plaintiff himself testified he told her to stay with her folks until they could get together on a settlement, - to stay there "until a later date".

He never returned to take her back to the house that he was living in, which had been the marital home, or to any other house which he occupied. She continued to live with her mother and father, and he saw her once or twice a month during some periods of the separation, and gave her $25.00 per month

to live on part of the time, and $62.50 per month some of the time. The only answer she ever got from the plaintiff as to their resuming cohabitation was that she had to stay with her folks and he "would see" later on. The last time he visited her was just before New Year's, 1961, and at that time he said "This trip will have to do for a long time".

On June 16, 1955, a month after the original separation, the defendant returned to the marital place, asked the plaintiff why they couldn't get together, and he said he didn't think they ever would, and he gave her $25.00. She returned to her mother's home. In July, 1955, she went to the farm where the plaintiff was living, their marital home, and got some of her clothes, but she did not have a conversation with the plaintiff at that time. The plaintiff at the trial was asked this: "Did your wife ever come back and try to start living with you while you were living at that place (Kuffel farm in 1955)?" His answer was: "One time she came back and said something about making amends to get back together and I said 'It's no use' ".

The evidence discloses further that on the day of the original separation when the plaintiff took his wife over to her mother's on the occasion of the birthday party they had had an argument and she had accused him of seeing other women. He testified he'd never been out with another woman. Some evidence indicates that he may have been seeing another woman at times,

(perhaps at times after this separation) but there was no evidence of any improper relations between the plaintiff and this other woman.

There is also evidence that in July, 1955, the defendant, through the State's Attorney of her County, had sent the plaintiff a registered letter asking him to resume cohabitation and talk, and in May, 1956 she had made arrangements for a meeting which they had with a Priest of St. Anthony's Parish concerning their getting back together. The plaintiff on each of those occasions had refused to resume the marital relationship or take the defendant back and live with her even as a housekeeper. The plaintiff continued to live on the farm which had been the marital home until February, 1956.

At the trial the defendant said she was willing to reconcile with the plaintiff.

The plaintiff introduced some testimony to show that the defendant was a careless housekeeper, sometimes there were dirty dishes on the table, magazines on the chairs, mostly love stories, the floor was dirty at their home, and she was delinquent at times in preparing meals.

Under the Divorce Act, CH. 40 ILL. REV. STATS., 1963, par. 1, The burden was upon the plaintiff to establish, as his alleged grounds, that the defendant wife had "wilfully deserted or absented * * * herself from the husband * * *, without any

reasonable cause, for the space of one year".

Under the Separate Maintenance Act, CH. 68 ILL. REV. STATS., 1963, par. 22, the burden was upon the defendant to establish that she, without her fault, lived separate and apart from the plaintiff husband, and, if she proved that, then she was entitled to a reasonable support and maintenance while they so live separate and apart, and in determining the amount to be allowed the Court was required to have reference to the condition in life of the parties at their places of residence, and the circumstances of the particular case.

Where the defendant wife's leaving the marital home is with the full consent and concurrence of the plaintiff husband, is even first suggested by him, receives his full approbation, and he assists the wife in making such removal, and she has no fixed intention to abandon the husband, the plaintiff husband's complaint for divorce on the alleged grounds of desertion is not proved: ALBEE v. ALBEE (1892) 141 Ill. 550. And if at any time during the statutory desertion period the spouse otherwise guilty of desertion in good faith and with an honest intention to resume marital relations returns or offers to return to the deserted spouse the continuity of the statutory desertion period is broken; for the statutory period the door for good faith repentance and return must be kept open, and if it is closed when an offer to return is made in good faith, not only is the original desertion terminated but

the party originally offended against may from that time forth be the offender; and where the defendant wife, assuming her otherwise to be guilty of desertion, makes repeated efforts for several months after the alleged desertion to return to her husband, but without success, he sometimes shunning her, sometimes ignoring her, and wholly failing, if not directly refusing, to receive her or let her live with him as his wife, the alleged desertion is terminated and did not continue for the statutory period: ALBEE v. ALBEE, supra; Cf. GARVY v. GARVY (1935) 282 Ill. App. 485.

A plaintiff husband, to establish a charge of desertion in a divorce complaint, must prove the defendant wife has absented herself and remained away from him without any reasonable cause and against his will; where the plaintiff has, expressly or impliedly, consented to the original separation or its continuance, and has not revoked such consent, he is not entitled to a divorce for desertion; where the defendant wife leaves the marital home, but the night before doing so the plaintiff husband told her to stay with her parents and that he would later come and get the defendant, and she goes to her parents' home, and he never thereafter asks her to return or live with him, the separation is with the consent, if not participation of the plaintiff husband, and the defendant wife may be justified in believing he did not desire her return, and under those circumstances it can-

not be said she "wilfully" deserted her husband, or absented herself "without any reasonable cause", - the plaintiff husband is not entitled to a divorce and the defendant wife is entitled to separate maintenance: LARI MORE v. LARIMORE (1939) 299 Ill. App. 547; Cf. McCARTNEY v. McCARTNEY (1951) 343 Ill. App. 533. Where the plaintiff husband helps the defendant wife to move to new quarters, and then declines to live with her, and consents to the separation, he has failed to prove she wilfully deserted him without any reasonable cause and a decree granting him a divorce would be against the manifest weight of the evidence: MATTEIS v. MATTEIS (1946) 328 Ill. App. 589. Where the husband, upon his absention from his wife, indicates, vaguely, it might be five hours, five days, or five months before he returns and he actually never resumes residence with his wife he is the party who may be guilty of desertion, - and, though there may be some contradictory evidence, the verdict of the trier of the facts will not be lightly disturbed: HOPKINS v. HOPKINS (1948) 399 Ill. 160. A living separate and apart to constitute desertion must be against the will of the party claiming desertion: GARVY v. GARVY (1935) 282 Ill. App. 485.

The principal cases referred to by the plaintiff are: THEISS v. THEISS (1959) 23 Ill. App. (2) 370 (abstract); FRANK v. FRANK (1913) 178 Ill. App. 557; STEVENS v. STEVENS (1904) 210 Ill. 362; LUTTICKE v. LUTTICKE (1950) 406 Ill. 181;

DE YOUNG v. DE YOUNG (1949) 338 Ill. App. 288 (abstract); HASTE v. HASTE (1953) 1 Ill. App. (2) 417 (abstract); JEFFERS v. JEFFERS (1956) 9 Ill. App. (2) 572 (abstract); WEBBER v. WEBBER (1953) 349 Ill. App. 154; SWAN v. SWAN (1947) 331 Ill. App. 295; and HOLMSTEDT v. HOLMSTEDT (1943) 383 Ill. 290. We do not believe the facts therein are the same as, or analogous to, those of the case at bar. They do not militate against our views. They are inapplicable to this case.

The essential conclusions of the Court in its decree that the defendant wife had not "wilfully deserted or absented * * herself from the husband * *, without any reasonable cause, for the space of one year", and that the defendant wife, without her fault, lived separate and apart from the plaintiff husband, are not contrary to the law and, under the circumstances, are not contrary to the manifest weight of the evidence. It was primarily for the Trial Court to consider and determine the weight and sufficiency of the evidence, the credibility of the witnesses, and where the preponderance or greater weight of the evidence rested. Its determination will not be lightly disturbed. Among other things, the Court doubtless considered as of some significance the facts and circumstances that the plaintiff husband did not come back to get the defendant wife at her mother's on May 15, 1955, the date of the original separation, the marital house was locked, he told her when she returned that she

could not stay there but must go back that same night to her mother's, that he himself in fact immediately took her back to her mother's, telling her to stay there until he same and got her, having earlier told her to get some of her clothes, that he told her (as he says) to stay with her folks until they could get together on a settlement at some "later date", that he never returned to take her back to the marital home or any other marital home, that he vaguely said as to resuming cohabitation that she must stay with her folks and he'd "see" later on, and that in June, 1955 she returned to the marital home, asked him why they could not get together, and he said he did not think they ever would, that he himself described that incident as "One time she came back and said something about making amends to get back together, and I said 'It's no use' ", that in July, 1955 she by letter asked to resume cohabitation and talk, that in May, 1956 she initiated arrangements to meet with a Priest about their getting back together, and that the plaintiff husband declined to resume the marital relationship. Under those, and the other relevant facts and circumstances, the Trial Court considered she had not wilfully deserted or absented herself from the husband, without any reasonable cause, for the space of one year, and that, without her fault, she did live separate and apart from him. We are not disposed to disagree.

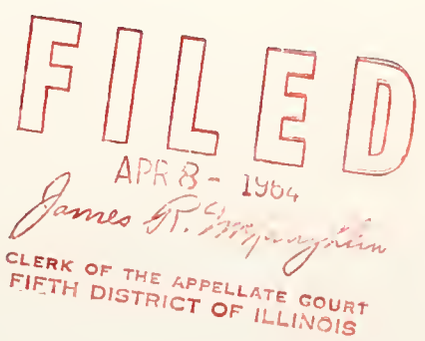
On the issue of the amount of the support money, the Court apparently took into consideration the present actual take-home pay of the plaintiff, which was about $220.00 per month, the money earned by the defendant herself, about $40.00 per month, that there were no child support matters involved, and that the plaintiff at times had during the separation voluntarily contributed $62.50 per month to her support. The award of $62.50 per month for her support is not unreasonable under all the present facts and circumstances. She was entitled to a reasonable support and maintenance and reference appears to have been had to the condition in life of the parties at their places of residence and the circumstances of the particular case.

The decree will be affirmed.

AFFIRMED.

SPIVEY, J. - Concurs

SMITH, J. - Concurs



Publish abstract only.

47 I.A.2nd 138

Gen. No. 64-F-24 (47 I.A.2 138) Agenda No. 17

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT.

ANN MOSS, Plaintiff-Appellant, vs. AARON WINGO, Defendant-Appellee.	APPEAL FROM THE CIRCUIT COURT OF FRANKLIN COUNTY.

DOVE, P.J.

On the afternoon of April 5, 1962, the defendant, Aaron Wingo, was driving a 1956 Ford automobile in a northwesterly direction around the public square in Benton, when the right front portion of his vehicle collided with the left rear portion of a Buick automobile, occupied by Rose Patton, her eleven-year old son, and the plaintiff. Thereafter, and on July 27, 1962, the instant complaint was filed, in which the plaintiff, Ann Moss, now Ann Scott, alleged that at the time of the collision she was a guest passenger of Mrs. Patton, and that, as a result of the collision, she was injured, and brought this action against Wingo to recover from him damages for her alleged injuries. The issues made by the pleadings were submitted to a jury, resulting in a verdict for the defendant. After overruling plaintiff's post-trial motion, this appeal by the plaintiff followed.

The complaint charged that defendant was negligent in that he failed, (1) to keep a proper lookout for other vehicles on the public square; (2) to keep his automobile under proper control; (3) to apply his brakes so as to avoid colliding with the car in which the plaintiff was a passenger; and (4) drove his automobile on the right one-half of the roadway when overtaking and passing another vehicle proceeding in the same direction. In his answer, the defendant denied all these allegations of negligence, and denied that plaintiff sustained the injuries as alleged.

Upon the trial, besides the plaintiff and defendant, Rose Patton was the only other occurrence witness who testified. Her account of what happened is that about noon on the day of the occurrence, she, accompanied by her son and her friend, the plaintiff, drove to Benton, and she parked her car on the public square. After she had completed her shopping, the three returned to her car. She was driving and her son was sitting next to her in the front seat, and the plaintiff was sitting to the right of her son. As abstracted, this witness continuted: "There were cars parked to my left. When I started backing out, I had to back out far enough so I could clear the car that was double-parked so as to swing out into the traffic. There were no cars coming from the east or south or anywhere around the square. As I got halfway past the second car, I heard air brakes from a truck. I glanced in my rear mirror and I saw this big semi coming onto the square. He was just coming around the square. He wasn't driving real fast, I guess. I was heading back out when I heard the brakes.

I also saw Mr. Wingo as I was backing out onto the square. I was putting my car in drive when he hit me. I can't say that I was moving. I was putting my car into drive to go forward. On impact, I felt Ann (the plaintiff) reach for the dash and hit the back of the seat. My back light was hit and there was a dent on the left rear fender. Both the stop light and the back-up light were broken out and there was a crease in the trunk. I got out of the car and talked to Mr. Wingo. He said, 'Is anyone in the car hurt?' I said, 'Not that I know of.' He said, 'I'm sorry. I will turn it in to the police.' I told him that I would get in touch with him later, and he said all right. We left from there and went to the hospital, and I noticed Ann beginning to get white and was nauseated at her stomach and she complained of her neck hurting."

On cross-examination, this witness said that at the time of the collision the rear of her car was more than three car lengths from the curb; that she looked around after she heard the air brakes and saw the semi-trailer coming onto the square; that the driver of this truck did not stop at the scene of the accident; that he continued around the square, and she did not know who he was; that defendant's car was on the right side of the semi-truck; that after the collision there were no scratches on the rear bumper of her car, and that the cost of the repairs to her car amounted to $34.00.

The plaintiff testified that upon the occasion in question, she was sitting on the right hand side of the Patton car; that Mrs. Patton backed her car from the curb and out of the

parking space on the public square, and had reached a point beyond a double-parked car to her left and into the regular flow of traffic, and "was starting to go forward on North Main, and this car hit us. The impact threw me against the dash and then back. My head hit the back of the seat. Rose got out of the car to talk to the defendant, and I heard Mr. Wingo say, 'Rosie, I'm sorry, it's my fault,' and he also said his foot slipped off the brake onto the gas pedal. We went directly to the hospital after the accident."

On cross-examination, this witness stated that she did not see either the defendant's car or the truck before the accident; that she heard the air brakes of the truck and the truck engine laboring loudly. She then testified: "The car I was in was parked in about the third or fourth parking place. The parking spaces are angled in front of the Wood building. They angle sort of northwesterly. There was a car to the left of the Buick, and one right behind that car, double parked, and Rose parked past the first and second cars and was ready to turn left behind this second car, to go around the square to make a right turn and go out to the hospital."

The defendant, who was the only other occurrence witness who testified, stated that he was seventy-two years of age and had an artificial right leg; that on the day in question he was driving a Ford 1956 automobile on East Main Street in Benton; that he entered the square from the east, and was traveling about ten or twelve miles per hour; that as he entered the square he observed a big trailer truck enter the square from the south; that this truck came up behind him very

fast, going at least twenty-five miles per hour; that he was about forty or fifty feet in front of the truck when he straightened his car to go around the square to his right; that he held up his hand to signal, but the truck proceeded toward him, and when he looked back the second time, the truck was in the general lane of traffice, and he was to the right of the truck, and the Patton car was about ten or twelve feet ahead of him. "I didn't have much room," continued this witness, "and I put on the brakes when I was four or five feet from her. I don't know whether she was coming out or not. She was about half-way of the second car that was parked double. I think she was moving the same as I. She was moving back. The right front of my car collided with the right rear of hers. On impact, her car went forward about three or four feet. At the time of the impact, her car was over half past the second car that was double parked. Probably half of her car was in my lane of traffic. After the accident, the truck went on. I stopped and talked to Rose. I did not tell her that my foot slipped off the brake onto the accelerator. It never slipped off the brake. No, I did not tell her it was my fault."

The foregoing is a fair resume of the evidence as to how this collision occurred. It discloses that appellant, at the time of the accident, was in the automobile of Mrs. Patton, as her guest passenger, and indicates that Mrs. Patton had backed her car from the curb on the north side of the public square in Benton, and was putting it in drive to go forward when her car was hit from the rear by appellee's automobile.

Defendant testified that the left rear wheel of his car was in the path of the right front wheel of the truck, and insists that the truck was responsible for placing defendant in the position in which he found himself just before the collision. This truck, however, according to defendant's testimony, was in its proper general traffic lane, and if it was, and defendant's car was to the right of the truck as they proceeded around the square, defendant's car, under the circumstances and conditions as shown by the evidence to have existed just before and at the time of the collision was in an area where it should not have been.

At the instance of the defendant and over the objection of counsel for plaintiff, the court gave to the jury this instruction:

> "There was in force in the State of Illinois at the time of the occurrence in question a certain statute which provides that the driver of a vehicle shall not back the same unless such movement can be made with reasonable safety and without interfering with other traffic. If you decide that Rose Marie Patton, the driver of the automobile in which the plaintiff was riding, violated the statute on the occasion in question, and that in violating such statute, Rose Marie Patton was guilty of negligence which proximately caused the collision, and if you further decide that the defendant, Aaron Wingo, was not guilty of negligence, then in that event, the plaintiff, Ann Moss Scott, would not be entitled to recover against the defendant, Aaron Wingo."

The statute referred to in this instruction provides that the driver of a vehicle shall not back the same unless such movement can be made with reasonable safety and without interfering with other traffic. (Ill. Rev. St. 1963, Chap. 95½, Art. XIV, sec. 189a), and the instruction is a modification of an approved IPI instruction.

This given instruction directed a verdict, and while it required the jury to determine that defendant was not guilty of negligence, it does not confine his negligence to the time just before or at the time of this collision, and it specifically calls to the attention of the jury the provisions of the statute, and tells the jury that if they decide that Rose Patton violated the provisions of this statute, and decide that Mr. Wingo was not guilty of negligence, then the plaintiff would not be entitled to recover. Mrs. Patton, the driver of the car in which plaintiff was a guest passenger, was not the defendant in this case. It was directed solely against Mr. Wingo. As the negligence, if any, of Mrs. Patton was not imputable to the plaintiff, and as the jury had been so instructed, the only purpose of giving this instruction would be to confuse the jury.

Instructions concerning the violations of a statute should not be given unless the evidence is adequate to support a finding that a violation actually occurred. (IPI, 60.00, p.234, citing McAtee v. Mantzaros, 340, Ill.App. 216, 91 N.E. 2d 138, an abstract opinion). In the instant case, the physical facts disclose that the front end of the Patton car was facing west when the right front end of defendant's car struck the left rear end of the Patton car. Mr. Wingo did not testify that the Patton car was moving backward when struck, by his car. He said he thinks so. According to the other two witnesses who were in the Patton car, that car was stopped or going forward. While the violation of a statute is **prima facie** evidence of negligence, (Burke vs. Zwick, 299 Ill.App. 558, 20 N.E. 2d 912; Brackett v. Builders Lumber

Co., 253 Ill. App. 107), such a violation is but one fact to be taken into consideration by the jury, along with all the other facts and circumstances in evidence, in determining the issue of negligence, (IPI, 60.01 pp. 235-6, and cases cited). As tendered by plaintiff, and given by the court, the instruction complained of omitted any reference to other facts or circumstances in evidence, and while plaintiff's objections to this instruction were not as specific as they should have been, the instruction was not an IPI instruction, and was not a correct modification of any IPI instruction, and it should have been refused.

Inasmuch as the issues made by the pleadings in this case will be submitted to another jury, we will not express any opinion as to the weight of the evidence, nor is it necessary to discuss the other errors relied upon by appellant for a reversal. We do not find that the trial court committed any reversible error in the admission or rejection of evidence or in requiring the plaintiff to submit to a physical examination at Evansville, Indiana, prior to the trial. Her rights were amply protected by the order of the trial court.

The judgment of the Circuit Court of Franklin County is reversed and this cause is remanded to that court for a new trial.

Reversed and Remanded for a new trial.

Reynolds, J., concurs.

Wright, J., concurs.

Publish abstract only.

49418

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff
~~Defendant~~-Appellee,

v.

DANIEL PIGFORD and CHARLES NEELY,
Defendants
~~Plaintiffs~~-Appellants.

APPEAL FROM
CRIMINAL COURT
COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Count I of an indictment charged that the defendants on October 21, 1961, committed the crime of mayhem upon Joseph Burns; Count II charged the defendants with assault with intent to kill and murder Burns and Count III charged the defendants with aggravated assault and battery upon Burns. A trial without a jury resulted in a finding of guilty as to Count I and a judgment imposing a penalty of three to nine years imprisonment in the penitentiary. There was a finding of not guilty as to Count II. The trial judge stated that it was unnecessary to make a finding on Count III because of the finding and judgment in Count I. Defendants, appealing, ask that the judgment be reversed.

At about 1:40 A.M., Saturday, October 21, 1961, Sergeant Joseph Burns of the Chicago Police Department, who had been in that service for 21 years and a Sergeant for 5 years, noticed an automobile double parked and a crowd of people outside a tavern on the northwest side of Ogden Avenue, northeast of Kedzie Avenue in Chicago. Sergeant Burns, alone and in uniform, parked his marked police squad car and walked to the tavern to investigate. He testified that on the way he was approached by Neely, one of the defendants, and thrown a "shoulder block." He proceeded on the sidewalk to the tavern. The door of the tavern was locked

and all seemed quiet on the inside. Sergeant Burns walked back on the sidewalk toward his car. He testified that he was met by Neely and again bumped. He said that he ordered Neely and the crowd to disperse; that Neely refused to do so; that he (Burns) put his arm on Neely's shoulder, but that Neely pulled it off; that Pigford approached from within the crowd and cursed him (Burns); that Pigford and Neely jumped on him but were thrown off; that someone said "Get his gun" and that he was attacked from three sides. The officer was kicked to the street and then kicked 15 to 20 times after he was down.

A most painful kick was inflicted to his right eye by the point of a shoe. Burns saw his gun 20 to 30 feet away but someone picked it up and ran. The injured officer struggled to his feet, reached his squad car and called over the radio for assistance. Fellow officers arrived within minutes and took Sergeant Burns to a hospital. He was bleeding from his left eye which was partly out of its socket. The eye was removed on November 7, 1961. On the same day at about 4:00 P.M. four police officers entered the tavern at 3166 West Ogden Avenue and at a pre-arranged signal from the bartender, arrested Neely and Pigford. The defendants denied any knowledge of the assault and claimed not to be near the tavern at the time of the assault. They were taken to the hospital where Sergeant Burns identified them. Pigford and Neely admitted being at the scene of the assault but denied any part therein. Neely supplied the officers with a list of names of the men present when the incident occurred and signed a written statement. The People's version of the events preceding and occurring at the assault was given in

testimony by Sergeant Burns and two eye witnesses, Frank Riley and Robert Young. Riley testified that Burns was on the ground surrounded by 6 men and that he was kicked from both sides. The defendants were among the 6 men and were about a foot from Sergeant Burns. Young testified that it looked like Burns was being kicked after he was knocked down. Pigford, Neely and several others, approximately 12 in all, were over him while he was down.

Pigford testified that he was born in Chicago, is 21 years of age and lives with his parents at 1506 South Albany Avenue, Chicago; that he left school in his junior year at Harrison High School and since September of 1959 and until the date of the alleged offense worked for the A. J. Cox Company, Chicago. He testified that on the night of October 20, he was in the tavern at Ogden and Kedzie Avenues, arriving at about 10:00 P.M. and leaving about 1:30 A.M. on the 21st. When he left the tavern he saw a crowd of people outside. There had been a fight in the tavern about five minutes before. He said he did not stop and that he went home. He went to work Saturday morning and said that he had to be at work at 7:45 A.M. He said that after he left the tavern at 1:30 A.M. he walked by the Pontiac showroom which is northeast of and on the same side of the street as the tavern, where Officer Burns hollered at him as the officer was coming across from his car and asked him where he "was coming from" and he told Burns that he was going home. He said that he left the officer and went home. He did not hear any words between the officer and Neely, and did not see Neely push the officer. Pigford testified that he did not touch the officer and that he did not spin him around.

Neely testified that he lives at 1732 South Spaulding

Avenue in Chicago. He came to Chicago from Mississippi when he was 9 years of age, went to elementary schools in Chicago and to high school, dropping out when he was in his third year at the age of 18. At the time of the trial he was 21 years of age. He worked part time for a food products company and has worked full time for that company since leaving school as a helper on a truck. He lives with his mother, three sisters and a brother. He testified that on Friday, October 20, he left his house after dinner and went to the tavern. A fight ensued between two young women in the tavern. When Neely returned from a visit to the washroom he was informed that Pigford had gone out. Neely went out. Pigford was down the street by the Pontiac showroom. Neely walked down toward Pigford and inquired as to what was going on and Pigford replied, "Nothing, I am going home." He testified that Sergeant Burns asked him, "Where are you going?" and that he replied that he was out for some air; that he was coming from the tavern; that he lived near by; when someone from the crowd called out, "You don't have to tell him nothing. Just get his badge number." Pigford testified further that Sergeant Burns started to walk away from Neely. Somebody uttered foul words. The Sergeant accused Neely of calling him a name. Neely pushed Sergeant Burns' hand away from his shoulder. Then Sergeant Burns started to take his night stick out. A loud voice hollered, "Get him. Take his gun. Take his stick." This witness said that somebody grabbed the Sergeant from behind and threw him. This witness said he went back to the tavern to get the girl he was with and take her home, which he did. Neely testified that he did not strike the officer and that he did not push or shoulder him.

Robert L. Young testified that he was a bartender at the tavern for over 5 years and that he was under indictment in the Criminal Court of Cook County charged with armed robbery. Young testified that the tavern license is in the name of a woman he stays with. Frank Riley, a tailor, testified that he is 28 years of age and at the time he testified was under indictment for armed robbery.

The defendants urge that the court erred in overruling their motion for a finding of not guilty at the close of the People's case. Defendants waived their right to complain of the denial of their motion for a directed verdict by introducing evidence after the motion was denied.

Defendants point out that the trial judge in his opinion found that the People did not establish beyond a reasonable doubt that the four feet of the defendants kicked Burns in the eye. The defendants analyze the testimony to support the contention of each that he was not guilty of the crime charged in Count I as principal or accessory. The defendants say that the assault on Burns came about as the result of acts of a group and that neither defendant was a part of the group. We agree with the position of the People that the claim of defendants that there were three separate assaults is based on an unreasonable interpretation of the evidence. There were three stages to the assault upon Sergeant Burns. He threw off Pigford, then Neely and was overcome by a gang of young men. The assaults occurred consecutively and approximately at the same location. If the assaults were separate as defendants urge, the beleagured Sergeant would have been able to draw his night stick or gun in his defense. There was competent evidence from

which the court had the right to decide that the defendants did not withdraw from the scene prior to the kicking and beating of Sergeant Burns. To the contrary, they were the aggressors who led the assault and whom two eye witnesses placed about a foot from Burns' body while he was being kicked. Even though the defendants may not have inflicted the kick which caused the loss of the eye, they aided and assisted in the assault and were at the very least accessories before the fact, properly treated as principals. People v. Rybka, 16 Ill. 2d 394,397; People v. Hughes, 26 Ill. 2d 114, 119. The maliciousness of the defendants' acts may be reasonably inferred from the circumstances. They are presumed to intend the natural and probable consequences of their conduct. People v. Yuskauskas, 268 Ill. 328, 331.

Riley and Young testified after the defendants closed their case. The testimony of Riley and Young directly contradicted that of defendants. The testimony of Riley and Young should have been introduced in the People's case in chief. We do not think that the defendants were harmed by the introduction of the evidence after the close of the People's case. The defendants were given the opportunity of and did cross examine these witnesses.

Defendants state that no proof was made by expert medical testimony of a causal connection between the removal of the eye of Sergeant Burns and the assault and injury. The testimony of Dr. William Deutsch, admitted by stipulation, and the testimony of Sergeant Burns, supported by that of other policemen, proved beyond a reasonable doubt that the kicking and the beating

inflicted by the defendants and their associates caused the removal of the victim's eye.

We think that the defendants were proved guilty beyond reasonable doubt as charged. The judgment is affirmed.

JUDGMENT AFFIRMED.

FRIEND, J., and BRYANT, J., concur.